No. 91-538

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FORSYTH COUNTY, GEORGIA
Petitioner

v.

THE NATIONALIST MOVEMENT
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Should the ruling of the Eleventh Circuit Court of Appeals that a parade license fee of up to $1,000.00 per day violates the First Amendment -- on the grounds that such a charge exceeds a nominal sum -- be sustained by the Supreme Court?

STATEMENT OF SUBSIDIARIES

The Nationalist Movement has no present subsidiaries or affiliates that are not intregal parts thereof.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATUTES

CONSTITUTION

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STATEMENT OF THE CASE

Respondent, The Nationalist Movement, is a pro-majority organization -- a

non-profit, charitable corporation [P.C. App. 8] -- which held a parade and rally in Cumming, Georgia, in January, 1988, about the courthouse square, to call for pro-majority reforms and to express opposition to the Martin Luther King Holiday. No fees were paid. It applied to Petitioner, Forsyth County, Georgia, and other governmental bodies to hold a similar parade and rally on January 21, 1989 [P.C. App. 18-19].

Petitioner interposed its parade ordinance -- originally adopted in January, 1987, and subsequently amended on June 8, 1987 -- for the January, 1989 parade, requiring up to a $1,000.00 per day fee, to which Respondent objected. The City denied use of its streets for the parade and the school denied use of its grounds for a rally and speeches [P.C.

App. 19-21].

Respondent, at the time, had approximately $90.59 cash assets in its bank account and supplies of flags and printed matter of nominal value [P.C. App. 8].

On January 19, 1989, Respondent sought declaratory and injunctive relief against Petitioner, charging, inter alia, that Petitioner's parade ordinance, which allowed the license fee of up to $1,000.00 per day, was facially unconstitutional, in violation of the First Amendment [P.C. App. 21].

The District Court held that the ordinance was not unconstitutional; the fee was not paid and the rally and parade were not held. The ruling was appealed and, on October 2, 1990, reversed by the Eleventh Circuit Court of Appeals, holding that an "ordinance which charges more than

a nominal fee for using public forums for public issue speech, violates the First Amendment." [P.C. App. 31]. On rehearing en banc, the ruling in favor of Respondent was upheld [P.C. App. 47-48].

SUMMARY OF THE ARGUMENT

Petitioner's de novo contention that Respondent lacks standing is treated by showing that Respondent is, indeed, the actual party in interest and that the tests for challenging an overbroad statute have been met. Objection is made, alternatively, to Petitioner's raising this new issue for the first time in this Court.

Respondent relies generally upon Murdock v. Pennsylvania, 319 U.S. 105 (1943), relied upon, also, by the Appeals'

Court, for the proposition that a free speech user fee can be, at best, nominal and that the instant $1,000.00 per day fee exceeds such constitutional limitation.

Respondent traces the history of the Stamp Act to illustrate that whether the odious measure is characterized as a "tax" or "fee" does not save it from being a restraint on liberty. Neither can Petitioner's characterizations of the charge as a requisite for police, trash clean up or administration resurrect it.

Respondent submits that the site of the rally -- the seat of government, county courthouse steps, quintessential, traditional public forum -- is crucial here, given the severe resrtriction on government to limit speech and assembly in such a key domain of democracy.

Modern constitutional doctrine is

examined, showing that the progression since Murdock has been to disallow charges and restraints on protected First Amendment activities. Alternatively, it is submitted that the Court may wish to disallow, at its option, parade application fees, nominal or otherwise, altogether, along the lines of its reasoning in poll tax and voting cases.

Murdock, itself, is delineated for its impact upon the earlier case relied upon by Petitioner, as well as for its logic and comportment with justice and national policy.

Petitioner's argument that alternate channels of expression substitute for assembly at the seat of government are examined -- notwithstanding that Petitioner attempts to support its position by reliance upon materials not of record

objected to by Respondent -- and found to be wanting. Speech and assembly are shown to be inseparably intertwined, heightening the importance of assembly at the traditional public forum, even if meeting in private homes or handing out flyers elsewhere were possible.

It is shown that the contention that other circuits are in disagreement is unfounded, insofar as others which have imposed free speech user fees have done so in non-public forum settings, distinguishable from the case at bar. One maverick case which might have bolstered Petitioner was remanded for equal protection considerations, where it likely will be reversed, with little precedential value.

Content neutrality claims are examined and faulted because of the potential for abuse. How would officials justify

"sliding scale" charges for police protection for celebrities? Controversial public figures? Poor people? Particularly in light of safety and police protection being a right, not a mere grant or whim of government, for those exercising the First Amendment.

Finally, the free speech permit is held up to the canvas of public policy, where, as a rationale for notice of public activity alone, it seems to blend in. As a license with a nominal fee, it is less harmonious. But as a $1,000.00 charge, it leaves too-indelible a blot on the fabric of the American Way of Life.

ARGUMENT

I. RESPONDENT HAS STANDING

A. RESPONDENT IS THE ACTUAL PARTY IN INTEREST

Respondent has standing to challenge the $1,000.00 parade application fee.

Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973), cited by Petitioner in support of its allegation that Respondent lacks standing,[1] concerns individuals who claimed, inter alia, that a rule was overbroad which prohibited wearing of

[1] It would appear that Petitioner has violated Rule 24, .1(a), Rules of the Supreme Court (1990), which provide that the brief may not raise additional questions already presented in its Petition for Writ of Certiorari (the question of standing was not raised heretofore by Petitioner, for which reason the point should not be considered, here). However, if the Court, at its option, under the Rules, considers the new point to correct a plain error, Respondent is prepared, as here, to argue the point.

political buttons and using political bumper stickers. They admitted, however, that they, themselves, did not engage in such activity, Broadrick, 413 U.S. at 609-610, so the court rightly held that they lacked standing. Here, however, Respondent is the one seeking the parade permit and who, because of its poverty, was unable to pay the fee to hold its rally at the Forsyth County seat of government.

B. OVERBREADTH TESTS ARE MET

In First Amendment cases, as here, "overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive and communicative conduct," Broadrick, 413 U.S. at 613. Insofar as Petitioner asserts that Respondent has "ample alternative channels for communication" -- other than at a

rally in front of the courthouse -- (such as by means of meetings in private homes and circulation of newspapers)[2], Petitioner must necessarily concede that the manner and place of expression is impacted by its ordinance, meeting Broadrick tests.

Petitioner's claim that there is no indication that "a substantial number of

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[2] See, e.g. Brief for Petitioner, p. 5.

Note that the challenged ordinance, by its terms, defines the requisite place: the "open air public meeting," Brief for Petitioner, p. xi, further satisfying Broadrick's requirement that an overbreadth claim treat a statute which regulates place (outdoors rally in front of the courthouse, rather than a gathering in an indoors community room), as well as manner (oratory before a crowd -- the classic "stump speech" -- rather than discussion in private homes or articles written in a newspaper), inter alia.

Note, also, that other public places for assembly, the school and the city streets, were ruled off limits to Respondent's proposed rally, as well, P.C. App. 20-21, by the school and the city.

instances exist" in which the law cannot be applied constitutionally, in reliance upon New York Club Ass'n v. New York City, 487 U.S. 1, 14 (1988), likewise falls.

Petitioner concedes that Respondent has rallied previously at the same locale with approximately 125 people, Brief for Petitioner, p. 3, and that some 200 people were expected for the January, 1989 rally, Brief for Petitioner, p. 8, which, because of the fee dispute, never took place. Petitioner, also, avers that Respondent's parades and rallies, at the site in question, in opposition to the King Holiday, are "frequent," "annual" and "perennial" [Petitioner's Brief on Appeal to the Appeals Court, p. 10].

Given hundreds involved in frequent, annual and perennial activities petitioning government, at the seat of government,

with public issue speech on a recurrent theme, a requisite, substantial number of instances are shown -- not only for Respondent but for the many others[3] seeking to attend its events -- where the law cannot be applied constitutionally.[4]

II. A $1,000.00 FREE SPEECH USER FEE VIOLATES THE MURDOCK CONSTITUTIONAL REQUIREMENT THAT SUCH A CHARGE BE, AT MOST, NOMINAL

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[3] Petitioner, also, notes that others, besides Respondent, have conducted "open air" marches and demonstrations for First Amendment purposes within the jurisdiction of Petitioner, Brief for Petitioner, p. 3, and that, including counter-demonstrators, such activities have involved thousands of people.

[4] Cf. e.g. City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (law overbroad when it seeks to prohibit too broad a range of protected conduct); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 967-68 (1984) (statute overbroad if it creates an unnecessary risk of chilling protected speech).

A. WHETHER TERMED A "FEE" OR A "TAX", THE FREE SPEECH USER CHARGE CANNOT STAND

Whether a sum collected by government is a "tax" or a "revenue enhancement" may, with tongue in cheek, be debated by politicians; whether a fee charged by government for assembly of the people is a "tax" or a "user fee" may, with stickling detail, be delineated by lawyers. But whether a permit fee to deliver a public speech is an abridgment of liberty or an advancement of the First Amendment should be, with eyes uplifted to Justice, the province of the Justices.

The Appeals Court found that an ordinance charging up to $1,000.00 for free speech activities in public parks and upon public streets exceeded the constitutional requirement that such a charge be

at most nominal.[5] P.C. App. 48.

Petitioner had no qualms about its reason for enacting the fee. The "permit fee serves to rid the public forum of ... unwelcome harassment" [Petitioner's Brief on Appeal to the Appeals' Court, p. 10].

> Presumably, a demonstrator's unwillingness to pay the required fee suggests that his motives for demonstrating are lacking in honest intent or that his ... speech [is] unimportant and deficient...." Id.

This stance seems to echo the opening message of Queen Anne to Parliament in 1712 in which she observed

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5 "Nominal," according to Black's Law Dictionary, 946 (5th Ed.1979), is:

> [n]ot real or actual; merely named, stated or given, without reference to actual conditions; often with the implication that the thing named is so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to a name.

> how great license is taken in publishing false and scandalous libels such as are a reproach to any Government. This evil seems to be grown too strong for the laws now in force. It is therefore recommended to you to find a remedy equal to the mischief.[6]

Consequently, Parliament quickly enacted the Stamp Act, which exacted a duty on all paper to which printing was affixed. An Act for Levying Special Duties, etc., 1712, 10 Anne ch. 19, §§ 101, 118.

This Court has observed that "the Revolution really began when in 1765 the home Government sent the stamps for newspaper duty to the American colonies," Grosjean v. American Press Co., 297 U.S. 233, 246 (1936).

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6 Stewart, John Lennox and the Greenock Newsclout: A Fight Against the Taxes on Knowledge, 15 Scot. Hist. Rev. 322, 325 (1918).

Did the colonists object to the stamps as a "tax" or as a restraint on liberty?

John Adams combined both objections and condemned both as part of

> a design ... to strip us, in great measure, of the means of knowledge, ... with restraints and duties.[7]

Respondent, likewise, condemns the fee at hand as an impermissible "free speech user fee," a tax on speech and a restraint on liberty.

True, it could have been argued in 1765 that the stamp fee was only imposed upon the paper, itself, and that by paying the small, even nominal, sum, the writer could express himself as he chose.

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7 Adams, Our Blood-Bought Liberty, 1 Great Debates in American History, 36 (M. Miller ed. 1913) (emphasis added).

But, happily, the American Revolution changed that view.

And, as a result, the First Amendment came to enshrine freedom of speech, assembly and petition.

Notwithstanding, it is argued -- belatedly in 1992 -- that the free speech user fee is only imposed on the courthouse steps and that by paying $1,000.00 the people can assemble, speak and petition to their heart's content. [See Brief for Petitioner, p. 37]: the ordinance

> imposes a responsibility for payment ... for a license permit ... without imposing a prohibition upon the expression of views....

Respondent is not charged, of course, with threatening to engage in obscene utterances, subversive speech or even "fighting words." Merely with being "unimportant," "deficient" and somehow

"harassing" to government officials, presumably by criticizing them.

B. NO CHARACTERIZATIONS CAN SAVE THE FREE SPEECH USER FEE

Petitioner does concede that its ordinance is "badly worded" [R3- -208]. So, to cloak its cold and sterile mannequin -- perhaps even to disguise its broken and ragged limbs -- it drapes a coat of many colors around it.

Its fee, it says, was, actually, the result of "counsel from the county attorney" [R3- -152], [R3- -136]. Or, the administrator's "personal time" [R3- -135]. Or, what the administrator "felt to be" a "reasonable" fee [R3- -139]. Also ascribed is the supposed need to

"maintain order" [R3- -214],[8] "take care of the county's administrative load"[9] [R3--214] or collect trash [R3- -145].

C. THE SITUS OF THE TRADITIONAL PUBLIC FORUM IS CRUCIAL

The Appeals' Court drew attention to "traditional public forums," which Petitioner does not treat at all in his Brief,

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[8] A doctrine of long standing has been, however, that the pretext of "maintaining order" cannot be used for the suppression of speech, Hague v. CIO, 307 U.S. 496, 516 (1939). Likewise, as to the "heckler's veto", or threats of violence, see, e.g. Gooding v. Wilson, 303 F.Supp. 942 (N.D. Ga.), appeal dismissed, 396 U.S. 112 (1969), aff'd 431 F.2d 885 (5th Cir. 1970), 405 U.S. 518 (1972) (mere public inconvenience, annoyance or unrest are not sufficient to bridle freedom of speech); Brandenberg v. Ohio, 395 U.S. 444 (1969); Terminello v. City of Chicago, 337 U.S. 1 (1949); and, Cantwell v. Connecticut, 310 U.S. 296 (1940).

[9] Petitioner's administrator testified that absent any extraordinary circumstances the entire permit application process could have been abbreviated [R3--156] to five, ten or fifteen minutes.

but which would appear to be a controlling factor, here, insofar as Respondent seeks to hold a rally on the courthouse green in front of the County Courthouse.

> Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks, are considered, without more, to be public forums. In such places, the government's ability to permissibly restrict expressive conduct is very limited....

United States v. Grace, 461 U.S. 171, 177 (1983) (any restriction on expression must be narrowly drawn and accomplish a "compelling interest"). See also, Perry Education Ass'n v. Perry Local Education Ass'n, 460 U.S. 37 (1983).

D. MODERN CONSTITUTIONAL DOCTRINE IMPACTS HEAVILY

The court below, also [P.C. App. 30], points to the "more recent Supreme Court cases" involving traditional public

forums, citing Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir.1985) which points to "modern free speech cases" and "modern constitutional doctrine," 774 F.2d at 1522.[10]

A poll tax dubbed a "ballot box user fee" would scarcely have escaped the same scrutiny in 1966 which Respondent seeks for the free speech user fee in 1992. The

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10 A sampling of such cases would include: Lubin v. Panish, 415 U.S. 709, 718 (1974) (indigent candidates' access to elective ballot cannot be barred by filing fee); Bullock v. Carter, 405 U.S. 134 (1972) ($150.00 to $1,000.00 election filing fee cannot bar indigent candidate); Bodie v. Connecticut, 401 U.S. 134, 149 (1971) ($60.00 filing fee for indigent seeking divorce is unconstitutional); Little v. Streater, 452 U.S. 1, 16-17 (1981) (indigent paternity defendant to be provided with blood test at government expense) and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax unconstitutional).

right to speak[11] is, certainly, not to be denigrated below the right to vote. More

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11 Other cases involving First Amendment user fees include: Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir.1983) ($200.00 application fee for marching along abandoned railroad line struck down); Collin v. Smith, 578 F.2d 1197 (7th Cir.1978), cert. den. 439 U.S. 916 (1978) (ordinance invalidated requiring insurance for paraders unable to afford insurance); Hull v. Petrillo, 439 F.2d 1184 (2d Cir.1971) (invalidating $15.00 annual license fee for selling newspapers on the street); International Society for Krishna Consciousness, Inc. v. Griffin, 437 F.Supp. 666 (W.D.Pa.1977) (invalidating fee for permit for distribution of literature); Moffett v. Killian, 360 F.Supp. 228 (D.Conn.1973) (invalidating $35.00 lobbying activity registration fee); and Gall v. Lawler, 322 F.Supp. 1223 (E.D. Wis.1971) (striking down $100.00 per day license fee on distributors of underground newspaper); Jones v. Opelika, 319 U.S. 103 (1943) (prohibiting license or tax to distribute literature); and, United States v. Texas, 252 F.Supp. 234 (W.D.Tex.), aff'd 384 U.S. 155 (1966) (disallowing poll taxes). See also, Follett v. Town of McCormick, 321 U.S. 573 (1944) (striking down $1.00 per day license fees for First Amendment solicitors door-to-door).

people do speak than vote.

E. MURDOCK IS CONTROLLING

For some fifty years, following Murdock v. Pennsylvania, 319 U.S. 105 (1943), the words of Justice Douglas were seemingly so strong and so clear that there was little doubt that free speech user fees could not stand.

The Court of Appeals was "aided substantially" by Murdock, P.C. App. 30, note 6, which held that government "may not impose a charge for the enjoyment of a right granted by the Federal Constitution," Murdock, 319 U.S. at 113.[12]

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12 Since the ruling below found the ordinance facially unconstitutional, the court did "not need to inquire whether the particular imposition of a fee ... is unconstitutional," P.C. App. p. 31, note 10. Therefore, whether a mere nominal fee may be charged is arguably not before the Court. However, alternatively, insofar as Murdock may have suggested that nominal

It should be said, therefore, that Murdock is settled law, of "long lasting acceptance," usually given great weight in the Supreme Court,[13]

The Murdock Court did not wallow in the quick sands of uncertainty when faced, as here, with a free speech user fee.

It is a license tax ... imposed on

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fees on free speech may be permissible, should the issue be ripe, here, it should be time to construe any fee as an unconstitutional restraint upon speech, cf. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), Lovell v. City of Griffin, 303 U.S. 444 (1937), Martin v. Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Marsh v. Alabama, 326 U.S. 501 (1946); Flower v. United States, 407 U.S. 197 (1972); Papish v. University of Missouri, 410 U.S. 667 (1973); and, United States v. Grace, 461 U.S. 171 (1983) (for various alternative rationales).

13 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). Stare decisis should also be a factor, see e.g. United States v. Rands, 389 U.S. 121 (1967) (the latter controls the former).

> the exercise of a privilege granted by the Bill of Rights. A State may not impose a charge for the enjoyment of a right granted by the Federal Constitution.

319 U.S. at 113, 63 S.Ct. at 875. No matter how Petitioner characterizes it.

When "the fee is not a nominal one," Murdock, 319 U.S. 105 at 116-117 at 876, the First Amendment condemns it.[14] Or, even more succinctly:

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[14] A random sampling of parade ordinances around the country suggests that modern-day ordinances generally do not require fees or that they provide waivers for those unable to pay any fees.

> Before any association, company, society, order, exhibition or aggregation of persons shall collect or gather together or parade or march upon the streets or public places of the city, they shall first obtain a permit from the city manager, which permit, when issued, shall be without charge, and shall state the time, manner and conditions of such march, parade or assembly.

City of Dubuque, Iowa, Code of Ordinances, §33-21 (1991) (emphasis added) (no charge).

City of Tucson, Arizona, Ordinance No. 4466, §§21-12 to -17 (April 12, 1976) (waiver authorized for any fees based on individual's ability to pay).

United States Capitol Police Board, Traffic and Motor Vehicle Regulations for United States Capitol Grounds, Art. XIX, §158 (1987) (no fees for assembly at the U.S. Capitol).

City of Raleigh, North Carolina, Ordinance, §§ 12-1051 et seq. (1989) (no fees for parade permit).

City of Jackson, Mississippi, Code of Ordinances, Art. V 1/2, § 27-156 et seq. (no fees for parade permit).

San Francisco, Calif., Park Code §§ 7.01, .06(c), .06(d) (1981) (exempting applicant from financial conditions of permit whose activity "is protected by the first amendment" and for whom meeting conditions "would be so financially burdensome that it would preclude applicant from using park property for proposed activity"); Ordinance No. 168-84, §2.71 (April 18, 1984) (authorizing waiver from permit's financial conditions if applicant certifies activity is for "First Amendment expression" and costs are "so financially burdensome that it would constitute an unreasonable prior restraint").

> Freedom of speech, freedom of press, freedom of religion are available ... not merely to those who can pay their own way.

Murdock, 319 U.S. 105, at 111 (emphasis added).[15]

Murdock, relied upon by Respondent and the Court of Appeals, comes after and

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[15] Respondent began in 1987, organizing pro-majority speeches, forums and debates. Its goal is majority-rule democracy in America. It is supported by donations, has no paid members or officials and has no income which inures to the benefit of its members or officials. Its income was approximately $205.40 per month as of January 19, 1989, all of which was expended generally for postage, printing and communications.

Its income was anticipated to continue at the level of approximately $200.00 per month. Its liabilities consisted in $1,600.00 in loans. Its physical assets at such time consisted of flags, supplies and printed materials of nominal value and $90.59 in cash. See, e.g., Application to Proceed in Forma Pauperis and Affidavit in Support of Motion for Temporary Restraining Order and Complaint; see also, P.C. App. 8. Respondent is, consequently, impecunious.

interprets Cox v. New Hampshire, 312 U.S. 569 (1941).[16] But the law -- and the

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[16] Cox came before this court in the context of a prosecution for parading without first obtaining a required permit, 312 U.S. at 570-571, 571-572 n. 1. It did not delineate a basis for assessing any authorized fees, given that it was, essentially, a facial challenge to a particular ordinance. In passing, the Court said that "drawing crowds of observers" could cause a permit fee to be "adjusted," 312 U.S. at 576-77.

This rationale, commonly called the "heckler's veto," was abandoned two years later in Murdock (permit fee confined to "nominal" sum) and rejected entirely in later cases.

An example of the "Heckler's Veto" would be that if the potential for opposing crowds was great and that disorder was threatened by crowds, the permit seekers' fees could be increased to the point that those desiring to petition the government could not afford to pay the fees and, therefore, be barred from assembly or speech in public. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (turning aside liability of demonstrators for disruptive acts of others); Coates v. City of Cincinnati, 402 U.S. 611. 615-16 (1971) (state may not bar public gathering "annoying" to others);

Bachellar v. Maryland, 397 U.S. 564, 567 (1970) (protesters cannot be punished because of "resentment" of spectators); Gregory v. City of Chicago, 394 U.S. 111, 117 (1969) (protester cannot be held for disorderly conduct due to surrounding crowd becoming hostile); Brown v. Louisiana, 383 U.S. 131, 133 n. 1 (1966) (plurality opinion) ("participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence"); Cox v. Louisiana, 379 U.S. 536, 550 (1965) (breach of peace conviction reversed where demonstrators accosted by "muttering" onlookers); and, Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (breach of peace convictions reversed where demonstrators at state capitol accosted by crowd threatening disruption of their peaceful demonstration). See also, Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 296 (1981) ("To place a Spartan limit - or indeed any limit - on individuals wishing to band together to advance their views ... while placing none on individuals acting alone, is clearly a restraint on the right of association") (see Petitioner's Ordinance #34, §§1(2), 3(6) P.C. App. 102, 119 limiting $1,000.00 permit fee liability to groups "more than three in number"). See also, In Re Primus, 436 U.S. 412, 426

modern progression of the law -- did not halt in the early 1940's. The channel for expression of ideas was widened and deepened and, even now, requires dredging.[17]

F. SPEECH AND ASSEMBLY ARE INSEPARABLE

Our national commitment to the First

(1978) (First Amendment protects group activity); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (freedom of association is an inseparable aspect of due process, which includes freedom of speech)

[17] The Court is urged, if it sees fit, to expressly overrule any lingering restraints on free speech attributed to Cox by ruling that any fee, nominal or otherwise, is an unconstitutional prior restraint on speech, akin, perhaps, to its reasoning in poll tax and other voting-related cases, cf. Jones v. Opelika, 319 U.S. 103 (1943), Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) and United States v. Texas, 252 F.Supp. 234 (W.D.Tex.), aff'd. 384 U.S. 155 (1966) (as to poll taxes and other license fees or taxes).

Amendment must remain unshorn.[18]

To turn from this well-worn path on the way to freedom's table land would thrust the feet of self-government out into the desert of oppression, there to wander among the snakes of tyranny and the scorpions of despotism. For indeed, only those who could afford the "toll" could travel democracy's highway; only those

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18 See, e.g. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citing a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust and wide-open"); Carey v. Brown, 447 U.S. 455, 467 (1980) (expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values"); in accord, Connick v. Myers, 461 U.S. 138 (1983); Terminiello v. Chicago, 337 U.S. 1 (1979) (speech said to serve high purpose by creating dissatisfaction with conditions as they are); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government").

who were "approved" by officialdom could cross the drawbridge.

It does not close the gaping wound of oppression to dab a little ointment on with the words: But you have alternative means of expression.[19] Even if Respondent publishes a paper, distributes flyers or gathers together in a member's home,[20]

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19 In this case, Respondent was banned from conducting a rally at the local high school or from parading through the city streets [P.C. App. 21] at all. Given the ban, also, at the county courthouse, Respondent was denied access to all traditional public forums in the area.

20 It should be noted at this juncture that Petitioner has refered to materials which were not part of the record, below [Brief for Petitioner, p. 5], in support of its contention that Respondent had "ample alternative channels" for expression: P.C. App. E-G (newspaper clippings), J (purported printed bulletin), K (order from separate court case), L-M (newspaper clippings), P-S (purported minutes of meetings) and U, W (purported printed bulletins), but which are not subject to consideration here. See Corpo-

only assembly of the people at the traditional public forums -- in this instance, the very seat of government, itself -- fully satisfies the guarantees of the

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ration Com. v. Cary, 296 U.S. 452 (1935), Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941), reh. den. 312 U.S. 715 (1941) (record cannot be added to on appeal).

Also, included at the end of the Joint Appendix is the sentence "All appendix items deemed relevant by the parties are found in the Appendix to the Petition for Certiorari." These words were included by Petitioner without the knowledge or consent, and over the objection of, Respondent. See Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 9, n. 2 (objecting to the said non-record materials). If the Court so desires, Respondent is prepared, nonetheless, to argue upon the extraneous matter.

First Amendment.[21]

G. THERE IS NO CONFLICT WITH OTHER CIRCUITS

In support of its claim that the court below is "out of step" with "other circuit courts of appeal," Petitioner cites South Suburban Housing Center v. Board of Realtors, 935 F.2d 898 (7th Cir.1991), reh. den., 1991 U.S. App.Lexis 20783 (7th Cir. 1991), cert. den. 60 U.S.L.W. 3520 (1992) (realty sale signs) and Kaplan v. County of Los Angeles, 894 F.2d 1076 (9th Cir.), cert. den. ___ U.S. ___, 110 S.Ct. 2590 (1990) (listing in

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21 Cf. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (freedom of assembly is inseparable from freedom of speech); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98 (1982) (concerted action is as much protected as individual action).

candidates' brochure). However, these cases do not involve the "traditional public forum," as here, and are, therefore, not in point.

Petitioner relies upon Fernandez v. Limmer, 663 F.2d 619 (5th Cir.1981) which actually threw out a $6.00 airport permit fee, holding that the fee was impermissibly conditioned on the applicant's willingness and ability to pay (an appropriate analogy to the instant case). Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir.1976), cert. den. 431 U.S. 913 (1977) actually struck down a $5.00 deposit for posting signs as an unconstitutional tax on exercise of the First Amendment (suggesting that government must find a means

less restrictive of free expression).[22]

Petitioner's attempt to extrapolate Ward v. Rock Against Racism, 491 U.S. 781 (1989) for the purpose of imposing fees upon free speech is misplaced. Ward does not impose fees on free speech; it simply allows the volume of music at a public forum to be modulated.

H. DESPITE CONTENT NEUTRALITY CLAIMS IN ITS BEHALF, THE FREE SPEECH USER FEE IS TOO FRAUGHT WITH POTENTIAL FOR ABUSE TO PASS CONSTITUTIONAL MUSTER

Petitioner insists that its ordi-

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22 Stonewall Union v. City of Columbus, 931 F.2d 1130 (6th Cir.1991), cert. den. ___ U.S. ___, 112 S.Ct. 275 (1991), also cited by Petitioner, would seem to be of little precedential value. While it did treat license fees in a public forum, in dicta, the case was remanded because the parade applicant was likely denied equal protection in the City's selective waivers of its fees. It will, likely, be reversed on that point.

nance is "content neutral," a claim which echoes the dictum that "rich and poor, alike, are free to sleep under the bridges of the Seine."

To those who might argue that the Stamp Act is, somehow, different than the Forsyth County parade permit fee, Justice Murphy, concurring in Follett v. Town of McCormick, 321 U.S. 573, 579 (1944) (concurring opinion) (striking down a $1.00 per day or $15.00 per year fee), might admonish:

> It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms ... unless it is kept within appropriate bounds.

Despite Petitioner's protestations that the content of Respondent's speech is immaterial [e.g., Brief for Petitioner, p. 37], Petitioner belies an underlying

objection -- even hostility -- to such speech, itself.

> [T]he Nationalist Movement has targeted Forsyth County ... to annually demonstrate its views and opposition to the Martin Luther King, Jr., holiday. Therefore, public policy supports imposition of a $100 fee to ameliorate the substantial costs expended by the County in funding the Nationalist Movement's perennial parade and rally.

[Petitioner's Brief on Appeal to the Appeals Court, p. 10]. So, if, arguendo, supporting the King Holiday is "public policy," then opponents of "public policy" must be assessed the fee, according to Petitioner's logic.

Petitioner states that its motivation to impose a charge stems from a desire to recoup its costs from "funding" Respondent's public assembly, perhaps as a king might tax his subjects for "allowing" them to gather at his pleasure.

Instead, according to Hague v. CIO, 307 U.S. 496, 515 (1939), government holds the public forum "in trust for the use of the public".[23]

In this regard, the "sliding scale" of Petitioner in calculating fees,[24] is particularly susceptible to abuse.

I. SAFETY AND LIBERTY: RIGHTS, NOT GRANTS

If, indeed, the fee is to "assure the safety" of citizens [Brief for Petitioner, p. 42] through a scheme whereby citizens pay for the use of police power

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23 See also Grosjean v. American Press Company, 297 U.S. 233 (1936) (any action of government preventing free discussion is an evil to be prevented).

24 Even the trial court expressed its difficulty in understanding the various distinctions attempted to be drawn by Petitioner between "private organizations," "private persons" and others in respect to its fees [R3- -208-209].

in their behalf, is the householder, next, to be presented with a bill for having a burglary at his home investigated? Or, is the fireman to stand idly by and watch a home go up in flames until a fee is paid?

Shall the poor be robbed and left destitute while only the rich are provided with police or fire protection?

Certainly not.

Citizens exercising their First Amendment rights are entitled to police protection, Wolin v. Port of New York Authority, 392 F.2d 83, 94 (2d Cir.1968), no less than a homeowner is entitled to protection of his property.

Just as the poor householder could not be expected to hire his own security guards, although the rich often can do so, here, impecunious speakers should not be

expected to hire their own police.[25]

The proposition of shifting the costs of police protection to those protected, even for "emergencies," has received no widespread support.[26]

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25 Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523 (11th Cir. 1985) condemned, on equal protection grounds, the effect of permit fees which, as here, disadvantage the poor:

> [I]ndigent persons, who wish to exercise their First Amendment rights of speech and assembly and ... are unable to pay such costs are denied and equal opportunity to be heard.

Central Florida was a basis of the Appeals' Court ruling in the instant case. Cf. Dombrowski v. Pfister, 380 U.S. 479, (1965).

26 One federal court even rejected a novel claim by a municipality to recover costs of emergency fire and evacuation services from a railroad responsible for a derailment, City of Flagstaff v. Atchison, T. & S.F. Ry., 719 F.2d 322, 324 (9th Cir.1983) (not involving First Amendment claims).

What, then, if perchance the Pope wished to come to town, to appear on the courthouse steps, the same place Respondent's seek? Would he be sent a bill for police services? No, because providing services uniformly for all demonstrations would be considered a regular part of police duty.[27]

What if a foreign dignitary showed up? Would he be billed? No, because police expenses have been specifically augmented by the federal government.[28]

What if Petitioner wanted to attract

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27 Cf. O'Hair v. Andrus, 613 F.2d 931 (D.C.Cir.1979) (injunction seeking payment of police costs by Archdiocese as precondition for appearance by Pope on the National Mall, denied).

28 See, e.g., 3 U.S.C. §208 (Supp.1984); 31 C.F.R. pt. 13 (1984); H.R. Rep. No. 533, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Ad. News 3633.

an event, such as a political convention, and, even, offer police services as an incentive?[29]

How, then, would the "sliding scale" slide?[30]

J. THE PUBLIC GOOD IS ADVANCED BY INVALIDATION OF THE FREE SPEECH USER FEE

Were Petitioner to prevail, multitudinous litigation would likely result as humbler elements of society, assessed greater and even prohibitory fees, call

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29 N.Y. Times, Oct. 21, 1983, at A-14, col. 6 ("San Francisco has pledged to spend $1.5 million to provide 1,500 police officers solely assigned to the convention and $1 million more, if needed, to augment those officers with police forces from the city's suburbs").

30 Note that special legislation has been enacted in cases where police services are donated so that such donations are not considered contributions counted against statutory campaign limitations, e.g., 11 C.F.R. §9008.7(b)(2)(iii)(1984).

officials to account for variations in such fees.

Hard-pressed officials could be given to impose fees, across the board, in an attempt to appear "even-handed," perhaps even taxing or surcharging Christmas caroling students as a ploy to excise candle light vigiling Nationalists from the streets... all to the crippling of impecunious, First Amendment paraders.[31]

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31 Another scheme might be "adjust[ing] the amount to be paid in order to meet the expense incident to the administration," Ordinance #34, Brief for Petitioner, p. xi, to include "execution under oath by each individual in a group applying for the permit of a pauper's affidavit," Ordinance #34, P.C. App. 109, 110.

Each poor member of a group of 2,000 would, incredibly, be required to execute an affidavit of indigency in order to march. A single member who was not impecunious, or a speaker who appeared before the group who was not poor, would be liable for all "administrative costs," including the execution of the affidavits.

[R3- -212-213]

The Court: In other words, if they say they're going to have 200 people there, that means you've got to have 200 affidavits.

Mr. Stubbs: That's correct, your Honor. If they've got 200 people, they're either all not indigent and they can pay a fee or they all are and they're going to have to say so.

...

The Court: All right. Suppose you get 200 indigents who can sign the affidavit and they're the ones who march, but when they get to the courthouse, Mr. Barrett gets up? He didn't march; he met them there. He gets up and makes a speech.

Mr. Stubbs: [T]hen that may be the basis for ... any other possible remedies.

All of the marchers go to jail because a speaker stands up and speaks, who may not be poor.

And what of a marcher who joins in the parade at a late hour, who has not signed an affidavit? If he joins in, is he -- and possibly all the others who

History indicates, however, that freedom-loving people will take to the streets in pursuit of liberty and justice,

allow him in -- to be arrested, as well?

[R3- -171]

Q. If the corporation has 2,000 members, you would require 2,000 affidavits, is that correct?

A. Yes, sir.

How long it would take to execute 2,000 affidavits prior to a parade is not known. It would, assuredly, be a lengthy period of time. Cf. Elrod v. Burns, 427 U.S. 347, 373 (1976) (loss of First Amendment rights for even a minimal period of time constitutes irreparable injury).

Petitioner, also, has no set rules to protect the privacy of the citizen wishing to exercise his First Amendment rights. See, Black Panther Party v. Smith, 661 F.2d 1243 (D.C.Cir.1981); Brown v. Socialist Workers' '74 Campaign Committee, 459 U.S. 91 (1982) (requirement of non-disclosure of names of persons taking part in protected activities).

Petitioner's procedure simply reeks of unbridled discretion in its officials.

be it to overturn the Stamp Act or tear down the Berlin Wall.

Should Respondent prevail, an aura of confidence in the American Way of Life would be restored: to the end that the inalienable right to liberty is advanced by peaceful, orderly democratic means.[32]

Otherwise, vigilantes, like Minute-men, may well proliferate. Streets may be filled with reformers disregarding the law, as they were once filled with Sons of

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32 See, e.g., The Nationalist Handbook, The Nationalist Movement 95, 97 (Learned, MS 1992):

> Obey and use all valid laws, particularly those concerning permits, sound, assembly, picketing and the like....
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> ...
>
> Filling up the town square may be more effective than filling up the

Liberty defying the king. Flags bearing a pine tree and "An Appeal To Heaven" may replace petitions here. And a Second American Revolution may well proceed over the outrage of the Forsyth Ordinance, much as the First American Revolution proceeded over the abuses of the Stamp Act.

But let the rainfall be the shower that awakes and refreshes, rather than the deluge that ravages and washes away.

To the end that a permit may, in no wise, be considered a prior restraint on freedom of speech,[33] a license to speak or to parade should have just one purpose:

> jails. Consult your legal counsel, follow his advice....

33 See e.g. Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1971) (denial of parade permit invalidated on grounds of being a "prior restraint" on free speech), citing with approval, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 155 (1969) (held, an applicant could

to satisfy the need for notice to public officials as to the time the parade will take place, so the officials can protect the general public, including those taking part in the activity. Jackson v. Dobbs, 329 F.Supp. 287, 292 (D.C.Ga. 1970), aff'd and remanded 442 F.2d 928 (1970).[34]

And so, the unpleasant harbinger of a New York Times Co. v. Sullivan, 376 U.S. 254 (1964) turned topsy turvy is avoided.

Under Sullivan, one is free to speak, unless he forfeits that right by acting out of actual malice. Reverse, here, and the people are no longer free to

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ignore an unconstitutional denial to parade with impunity).

[34] No permit at all seems preferable to a permit which impermissibly abridges First Amendment rights. Cf. Kunz v. New York, 340 U.S. 290 (1951) (striking down religious assembly permit for giving too much discretion to issuer so as to abridge

speak, unless the abridger of their rights forfeits his ability to enforce his ban by acting out of actual malice. Affirm, and it is the speaker, alone, who may disqualify himself[35] from speaking. Not the

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First Amendment; no permit fee involved).

[35] Such disqualification might be

> to advocate, advise, teach the duty, necessity, desirability, or propriety of the destruction of life by murder or assassination; the destruction of property by violence or arson; or the disruption of Government, by any of the aforesaid means....

Proposed Internal Security Act of 1968, testimony of Richard Barrett before United States Senate, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, Point 6, p. 601, March 26, 1968, U.S. Government Printing Office. See cf. Richard Barrett, The Flag Defilement Statutes Defiled, 5 Memphis State University Law Review 398-399 (1975) (citing police power, the Necessary and Proper Clause of the Constitution, valid state objectives and promo-

courts. Nor officials. Nor government.

So, the free speech permit is held up to the canvas of public policy. As a permit, alone, its colors seem to unobtrusively blend in with the background. As a license with a nominal fee, its texture is somewhat less harmonious, more distinctly out of place. But as a $1,000.00 fee, it leaves an indelible blot, marring the red thread of liberty, the white yarn of safety and the blue cord of democracy which make up the fabric of a free people.

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tion of responsibilities of citizenship for limitations upon speech).

The patriotic must be distinguished from the subversive, the moral from the immoral, in issuing permits. Liberty which allows uniformed veterans to march

III. CONCLUSION

How unthinkable that those surveying the rubble of the Berlin Wall would gaze beyond their Old World -- drenched in the blood of wars, invasions and oppression -- to our New World and, through tear-filled eyes, here, witness the erection of barricades against Americans lawfully and peacefully parading in the streets. And so soon after they have torn down the same barricades of their own.

We cannot slip backwards into darkness and despotism; we must always be the land of hope and light.

It would seem that labeling a skunk a cat would have no effect on the odor.

Likewise, it is too late to label a

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down the street waving flags does not permit naked homosexuals to march down the street waving condoms.

free speech user tax as a "parade application fee" to camouflage its pernicious attack upon free speech and assembly.

One wonders -- but not for long -- Would a poll tax have survived being labeled a "ballot box user fee"? No similar window dressing can disguise the instant free speech user tax, however, by incessant insistence that it is not a tax.

The case at bar is, in addition, a classic rearguing of the propriety of the "heckler's veto," already ruled upon, in all its many facets, by this Court.

Striking down the free speech user fee does not rob the beleaguered public fisc. For it is one thing to tax the income of a preacher, but quite another to make him pay to deliver a sermon.

When Respondent's rally does proceed and speeches are delivered in public

places without fear or fees, Petitioner's complaints against the "unimportant" speech it hears may well be recorded along with those who placed a similar onus upon the words of a lanky orator at Gettysburg.

The oppression and injustice of a $1,000.00 free speech user fee is neither contemplated under the inalienable Rights of Man, the First Amendment nor a time-honored tradition here, for which reason -- together with those reasons hereinbefore set forth -- Respondent requests that the Appeals' Court be affirmed.

THIS the 27th Day of February, 1992.

Respectfully submitted,

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CERTIFICATE

THIS CERTIFIES that the undersigned has, this day, mailed, postage pre-paid, three true copies of the foregoing Brief of Respondent to Robert Stubbs III, Esq., Attorney for Petitioner, at 110 Old Buford Rd., #200, Cumming, Georgia 30130.

THIS the 27th Day of February, 1992.

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RICHARD BARRETT